(16,161.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1897.

No. 110.

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MARGARET HETZEL, TO THE USE OF THEODORE BACON, TRUSTEE, PLAINTIFF IN ERROR,

*vs.*

THE BALTIMORE AND OHIO RAILROAD COMPANY.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE B. & O. R. R. Co.
At Law. No. 15713.
Appeal No. 418.

Now comes the defendant in the above-entitled cause and moves the court to dismiss the appeal taken from the judgment entered herein on the 20th day of October, 1894, in the supreme court of the District of Columbia, under section 4 of rule 10 of the Rules of the Court of Appeals of the District of Columbia, for failure of the plaintiff to give bond for said appeal within the prescribed time.

HAMILTON & COLBERT,
*Attorneys for Defendant.*

Frank W. Hackett, Esq., attorney for plaintiff:

Please take notice that on Monday next, the 14th instant, at the opening of the court or as soon thereafter as counsel can be heard, we will call up the foregoing motion in the Court of Appeals of the District of Columbia.

HAMILTON & COLBERT,
*Attorneys for Defendant.*

Service acknowledged this 8th day of January, 1895.

FRANK W. HACKETT, *For Pl'ff.*

Endorsed: Court of Appeals, D. C., January term, 1895. No. 418. Margaret Hetzel, use of, &c., appellant, *vs.* B. & O. R. Co. Motion to dismiss by appellee. Court of Appeals, District of Columbia. Filed Jan. 8, 1895. Robert Willett, clerk.

2 TUESDAY, *January 15th, A. D.* 1895.

* * * * * * *

Justice Morris did not sit at the hearing of the motion in case No. 418.

MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY.
No. 418.

The motion to dismiss the appeal in the above-entitled cause was argued by Mr. M. J. Colbert in support and by Mr. Frank W. Hackett in opposition.

3 Court of Appeals of the District of Columbia.

MARGARET HETZEL, Appellant,
*vs.*
THE B. & O. R. R. Co., Appellee. } No. 418.

Now comes the appellant, by her counsel, and suggests to the court a diminution of the record, in that a motion is pending to dismiss the appeal on the ground that the bond for security for costs was not filed in time, and it is material and necessary to show to the court that a motion to dismiss the appeal was overruled by the court below; also that this cause is meritorious. Wherefore she asks that the record may be corrected by requiring the clerk of the supreme court of the District of Columbia to certify:

1. The order of the court overruling the motion of defendant to dismiss the appeal.

2. The date and amount of the judgments heretofore entered upon verdicts rendered for the plaintiffs, with the respective dates of the judgments of the general term setting aside said verdict.

By FRANK W. HACKETT, *Of Counsel.*

I solemnly depose and say on oath that the omitted matter referred to above is material and necessary to the fair trial of the motion to dismiss the appeal, and material and necessary to the fair trial of the case on its merits.

FRANK W. HACKETT.

Subscribed and sworn to before me this 17th day of January, 1895.

ROBERT WILLETT, *Clerk,*
By H. W. HODGES, *Ass't Clerk.*

Endorsed: Court of Appeals, D. C. 418. January term, 1895. Margaret Hetzel, appellant, *vs.* The Baltimore and Ohio Railroad Company. Suggestion of diminution of record by appellant. Court of Appeals, District of Columbia. Filed Jan. 17, 1895. Robert Willett, clerk.

4 Court of Appeals, District of Columbia.

MARGARET HETZEL, Appellant,
*vs.*
THE B. & O. R. R., Appellee. } No. 418.

I, J. Enos Ray, of Chillum, Maryland, on oath depose and say that I am a student in the office of Frank W. Hackett, counsel for plaintiff in this cause. On the 17th January, between 12 and 1 o'clock p. m., I left at the office of Hamilton & Colbert, Esquires, counsel for def't, in an envelope addressed to them, a copy of the suggestion of diminution of record & application for writ of certiorari which I copied from the original now on file, and which I compared together with a copy of the notice that the same would be applied for on Monday, the 21st inst., which also was a true copy of said original notice.

J. ENOS RAY.

Subscribed and sworn to before me this 24th day of January, 1895.

ROBERT WILLETT, *Clerk.*

Endorsed: Court of Appeals, D. C., January term, 1895. No. 418. Margaret Hetzel, app't, *vs.* B. & O. R. R. Co. Affidavit of J. Enos Ray. Court of Appeals, District of Columbia. Filed Jan. 24, 1895. Robert Willett, clerk.

5 THURSDAY, *January 24th, A. D.* 1895.

* * * * * * *

MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 418.

Now comes Mr. Frank W. Hackett, attorney for the appellant, and suggests to the court here a diminution of the record filed in the above-entitled cause from the supreme court of the District of Columbia, and prays the court for a writ of certiorari directed to the said supreme court, commanding them to send to this court forthwith a true copy of the papers enumerated in the motion filed January 17th, 1895, in this cause, which is granted; and the said writ is ordered to issue as prayed.

(Mr. Justice Morris did not sit at the hearing of the above motion.)

6 FRIDAY, *February 15th, A. D.* 1895.

* * * * * * *

MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE B. & O. R. R. Co. } Appeal No. 418.

The appellant, under the decision of the justice in the court below, having brought into this court the transcript of the record, this court will not now act upon the motion to dismiss the appeal, but will reserve the consideration of that motion until the final hearing, and will then hear argument and consider the motion in connection with the other question of the case.

*Per curiam:*

R. H. ALVEY, *Ch. Justice.*

7 In the Court of Appeals of the District of Columbia.

MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 418.

In the Supreme Court of the District of Columbia.

MARGARET HETZEL, Plaintiff,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant. } At Law. No. 15713.

THE UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration filed April 24, 1876.

*Memorandum.*

Original declaration filed April 24th, 1876.

*Declaration as Amended.*

Filed June 4, 1890.

MARGARET HETZEL, Plaintiff,
*vs.*
THE BALTIMORE AND OHIO RAILROAD. } At Law. No. 15713.

The plaintiff sues the defendants, a corporation duly incorporated under the laws of the State of Maryland, and of the United States of America, and doing business in said District of Columbia—

For that whereas the said plaintiff, before and at the time of the committing of the grievance hereinafter mentioned, was, and from thence hitherto hath been, and still is, seized in fee of a certain lot of land, situate and being on the corner of D and North Capitol streets, in the city of Washington, in said District, being lot numbered one, in square six hundred and thirty, in said city, and whereas said D street before and at the time of the committing of the said grievance hereinafter mentioned, hath been and still

8 is a common public street and highway for all persons to go, return, pass, and repass, in, by, and with coaches, carts, wagons, and other carriages, as well as on foot, at their free will and proper pleasure, to wit, at Washington aforesaid, in this District, and was used by said plaintiff and others as of right for access to and egress from said lot, yet the said defendants, well knowing the premises, but contriving and wrongfully intending to injure the said plaintiff, and to incommode and annoy her, together with the

public, in the use and enjoyment of said D street and more particularly to prevent the plaintiff's and others' use and enjoyment of that portion of said D street upon which plaintiff's lot abuts to obtain access to and exit from said lot of land, and with intent wrongfully to diminish the value of said lot of land, at said Washington, on the 24th day of April, 1873, and at divers other times since said date, have wrongfully, unlawfully, and injuriously obstructed said D street by placing thereon freight cars, in large numbers, and suffered the same to remain there unreasonably long, at frequent times for twenty-four hours at each time, and by loading and unloading freight in said D street, and by using said street for the general purpose of a freight yard, and by blocking the way with wagons and carts for the loading and unloading of freight, and have thereby prevented the plaintiff, as well as the public, from passing and repassing on said D street, and more particularly from using that portion of D street on which plaintiff's lot abuts, to gain access to or exit from said lot of land, and still obstructs said street, and still prevents her, as well as the public as aforesaid, and thereby have materially and seriously diminished the value of said land and prevented the plaintiff from selling the same, though she tried so to do, to the special damage of the plaintiff, as she says, the sum of ten thousand dollars.

FRANK W. HACKETT,
*Att'y for Pl'ff.*

*Pleas to Amended Declaration.*

Filed June 13, 1890.

In the Supreme Court of the District of Columbia.

MARGARET HETZEL, Plaintiff,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.
No. 15713. At law.

For plea to the plaintiff's amended declaration, and to each and all of the several counts thereof severally, the defendant says:

1. For a first plea, that it is not guilty, as alleged.

2. And for a second plea, that the plaintiff's alleged cause of action did not accrue within three years before the institution of this suit.

6. And for a sixth plea, that the plaintiff ought not to have or maintain her suit against the defendant, because at a former
9 term of the court the plaintiff recovered a judgment against this defendant in the sum of $843.86, in a suit at law, No. 1797, for the same identical cause of action, which judgment has been duly paid and satisfied by this defendant.

M. F. MORRIS,
G. E. HAMILTON,
*Attorneys for Defendant.*

Upon these pleas issue was joined by the plaintiff in the usual form.

SATURDAY, *October* 20, *A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

MARGARET HETZEL, Plaintiff,
*vs.*
THE BALTIMORE AND OHIO RAILROAD CO., Defendant. } At Law. No. 15713.

This cause coming on to be heard upon the plaintiff's motion for a new trial, and the same having been heard, it is considered that said motion be, and the same is hereby, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiff recover against said defendant one (1) cent, in manner and form aforesaid assessed, but without costs, and have execution thereof. Whereupon the plaintiff notes an appeal to the Court of Appeals.

In the Supreme Court of the District of Columbia.

MARGARET HETZEL, Use of THEODORE BACON, Trustee,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY. } At Law. No. 15713.

The President of the United States to the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal noted in open court in the supreme court of the District of Columbia on the 20th day of October, 1894, wherein Margaret Hetzel, to the use of Theodore Bacon, trustee, is appellant and you are appellee, to show cause, if any there by, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 19th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

10 Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this — day of ——, 189–.

——,
*Attorney for Appellee.*

(Endorsed:) No. 15713. Law. Margaret Hetzel, use, &c., *vs.* Baltimore and Ohio R. R. Co., appellee. Citation. Issued Nov. 19, 1894. Served copy of the within citation on within-named appellee by service on Wm. Alvey, agent of appellee, Nov. 20, 1894. Albert A. Wilson, marshal. Frank W. Hackett, attorney for appellant, 486 La. —.

*Memorandum.*

1894, November 24.—Bond for appeal filed.

*Bill of Exceptions.*

Filed December 29, 1894.

In the Supreme Court of the District of Columbia.

MARGARET HETZEL
*vs.*
THE B. & O. R. R. Co. } At Law. No. 15713.

The following facts are undisputed:

The plaintiff owned land at the corner of D street northwest and North Capitol street, in the city of Washington. It was unimproved. The defendant maintained and used for the reception and delivery of freight a railroad track in D street, along the side of plaintiff's premises, about where the sidewalk would be. The track stopped in D street, being a siding. The street was occupied by freight cars on the track, and carts backed against the cars, so that access to the plaintiff's premises on D street was destroyed. The track was illegal and defendant so conceded at the trial.

Plaintiff brought a suit in April, 1873, to recover damages for this obstruction and recovered judgment, which was paid. The present suit covers the period of three years, from April, 1873. The declaration in the two suits is the same, except that the present declaration has been amended so as to contain the additional wording "and prevented the plaintiff from selling the same, though she tried so to do."

The plaintiff, to maintain the issue on her part joined, testified as a witness that she owned the entire lot numbered one, in square
11 630; that she was a joint owner with Judge Wylie in some 28,000 feet, but became sole owner in 1872; that she had not used the land since January, 1870, because it was impossible to get upon it; had tried to sell it, with no success, parties saying that the position of the railroad rendered it useless to them; that there was no access to the land from D street except on foot, and that the occupancy of the street by freight cars and loading and unloading of freight was continuous during the entire period covered by this suit; that during this period she had made every possible effort to sell it; instructed real-estate agents to sell or get an offer for purchase. The property was to be sold in any way that they could sell it; to sell it or lease it or in any way to get people to build upon it; that she authorized them to sell it as one lot, but never confined them to selling the whole. Upon cross-examination the witness said: "Of course, I gave them the whole lot to sell, but I did not forbid them to sell any part, and my instructions were to make some disposition of it, so that it could be utilized in some way; to lease it or to sell it, in whole or in part, or in any way. I always told

them I wanted to sell or lease the whole or any part of it, in order to get buildings put up on the front of it."

The plaintiff introduced the testimony of witnesses, who were real-estate agents and who had the land throughout that period or during that period, to the effect that the street was obstructed; that they took persons there to buy who objected to buying because of the D Street track, and that they could readily have sold the lot, had it not been for the obstruction of that track, for a certain price per foot; also testimony of experts as to the value of the land with the D Street track there and with that track removed. It further appeared that an offer made for a part of the lot on the corner of D street was declined by the plaintiff because she did not choose to sell off a part. Mr. W. H. Main and E. J. Whitaker, both authorized as agents by plaintiff to sell the property, testified as witnesses for the plaintiff in effect that they were instructed to sell the lot 1 as an entirety and were not permitted to sell in parcels. No other agent of the plaintiff or witness in the case testified as to instructions of plaintiff on that point.

The defendant put in evidence the record of conveyances disclosing the title and tending to prove that the plaintiff and Judge Wylie had owned as tenants in common, since 1855, all of original lot 1 except 35 ft. 10 inches by a depth of 120 feet; that in December, 1871, they subdivided their holding into sublots numbered from 1 to 11, with alleys, according to a plat which was put in evidence, dated Jan. 2, 1872, upon which plat was recorded as follows: "This is to certify that we have subdivided that part of lot 1, in square No. 630, owned jointly by us, into the lots as laid down in the above plat as lots 1 to 11, both inclusive, with the alleys for their accommodation, which alleys are exclusively for the sole benefit and use of said lots;" that at same time they executed a deed of partition, which gave the lots 1–5 in severalty to plaintiff and lots 6–11 to Wylie, but did not convey the fee in the alleys; that in January, 1872, Wylie conveyed to Tyler and Tyler to the plaintiff
12 lots 6 to 11 and that portion of lot 1 (35 feet 10 inches front) just mentioned as not having been held by plaintiff and Wylie in common, but did not convey the alleys as such. The deeds read: Lots six (6), seven (7), eight (8), nine (9), ten (10), and eleven (11), being subdivisions of lot one (1), in square No. six hundred (600) and thirty (30), on the ground plan of said city, according to the metes and bounds, covenants and conditions set forth and described in the deed of partition, dated December 28th, 1871, entered into by and between Andrew Wylie & Mary C., his wife, and the said Margaret Hetzel, and recorded, with plat of subdivision annexed thereto, in Liber —, folio —, one of the land records of Washington county, in the Dist. of Columbia, as by reference to said deed and plat of subdivision will more fully appear; also all that part of said lot one (1), in said square No. six hundred (600) and thirty (30), at the northeast corner thereof, fronting on North Capitol street thirty (30) five (5) feet & ten (10) inches by a depth of one hundred (100) twenty (20) feet, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the remainders,

reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, whether at law or in equity, of the said party of the first part of, in, to, or out of the said piece or parcel of land and premises.

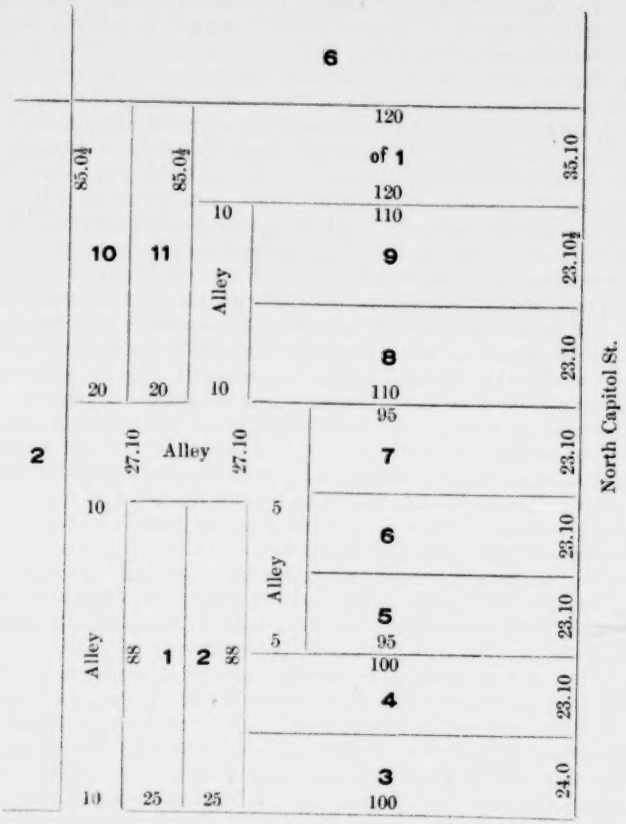
The partition deed of Wylie and Hetzel reads as follows:

"This indenture made and entered into this 28th day of December, 1871, between Andrew Wylie and Mary C. his wife of the first part, and Margaret Hetzel of the second part all of the city of Washington, D. C. Whereas the said Andrew Wylie and Margaret Hetzel are tenants in common in fee-simple of the whole of lot one in square six hundred and — (630) according to the ground plan of the city of Washington except that part of said lot at the northern — and thereof fronting on North Capitol street thirty-five & $\frac{10}{12}$ feet by a depth of one hundred and twenty feet now owned by said Wylie exclusively; and whereas the said parties have agreed to make partition between them of that part of the aforesaid lot which they hold in common as aforesaid and for that purpose have had a subdivision made thereof of which the plan has been recorded in the office of the surveyor of said District acknowledged by the said Wylie and the said Hetzel the — day of December, 1871, and have agreed that in such partition the said Margaret Hetzel shall have allotted to her lots one, two, three, four and five, and the said Wylie lots six, seven, eight, nine, ten and eleven, according to the said plan of said subdivision. This indenture therefore witnesseth that for the purpose aforesaid the said Andrew Wylie and Mary C. his wife do hereby convey, assign and forever quitclaim unto the said Margaret Hetzel her heirs and assigns in fee-simple all of the aforesaid lots numbered in the subdivision aforesaid as lots one, two, three, four and five and the said Margaret Hetzel doth hereby convey, assign and forever quitclaim unto the said Andrew Wylie his heirs and assigns, all of lots numbered and designated
13 in said plan of subdivision as lots six, seven, eight, nine, ten and eleven henceforth each of said parties to have and to hold his and her lots apportioned as aforesaid in severalty. And the said parties Andrew Wylie and Margaret Hetzel do and each of them doth hereby mutually covenant and agree to and with each other as follows that the said Margaret Hetzel her heirs and assigns shall have the right to erect any structure or building from lot number one on D street north over or across the alley entering from that street on condition that an open space of ten feet in width and twelve feet in height shall at all times be kept clear for ingress and egress for the use of the other lots in the rear bounding on the alleys and area as designated in said plan. Also that the said Andrew Wylie his heirs and assigns being owner or owners of lots eight, nine and eleven in said plan, and of the above-mentioned part of said lot one in said square not embraced in this partition but owned at present by the said Wylie as his own individual property fronting 35$\frac{10}{12}$ feet on North Capitol street by 120 in depth may at any time in their discretion close the ten-foot alley running northward from the main area in the rear of lots eight and nine. Also that the owner or owners of lots four and five shall have the

like privilege to close the five-foot alley along the rear of lot five and part of lot six so far as the main area aforesaid. Also that all these alleys and area shall be private and to be under the control of all owners of property touching thereon, and except as hereinbefore otherwise provided shall never be closed unless by common consent, and the owners thereof and of each of said lots shall at all times contribute their and each of their joint and equitable proportions of all proper and necessary charges for paving the said alleys and area and keeping the same in proper condition by means of drains, sewers or otherwise and the same are to be for the exclusive use of said owners. And the parties hereto have annexed to this deed and made it part of the same for illustration and reference a copy of the aforesaid plan of their subdivision. In testimony whereof," etc.

Defendant also introduced testimony tending to prove that since 1872 the property has been assessed for taxation and taxes paid upon it as subdivided into lots from one to eleven.

14




North D St.

The plaintiff prayed the court to instruct the jury as follows:

(1.) If the jury find from the evidence that the plaintiff from the 24th of April, 1873, to 24th April, 1876, owned lot 1, in square 630, in the city of Washington, and that during that entire period the defendant company maintained on D street between North Capitol street and New Jersey avenue a railway track over and along the bed of said street parallel to the southern boundary of said lot, as testified to by the witnesses, and used the same for the reception and delivery of freight in such manner as to interfere with or prevent reasonable access to and egress from the said lot from D street, and that such maintenance and use of said track affected injuriously the value of the said lot, so that the plaintiff could not advantageously use, sell, or rent the same, and if the jury are further satisfied that during this entire period the plaintiff was trying to sell the lot or make some use of it and could not do so because of said track, then the plaintiff is entitled to recover in this suit such damages as will resonably compensate her for the loss or injury so resulting from the maintenance and use of the said track from 24th April, 1873, to 24th April, 1876.

(2.) The jury are instructed that if they shall find that the property in question was rendered unsalable by reason of the alleged nuisance, and, further, that the plaintiff in good faith was trying to sell it, an allowable method for them to estimate the measure of damages is to ascertain what the plaintiff might have obtained for the property with the obstruction there and what she might have obtained for it with the obstruction removed, and allow her the legal rate of interest—that is, six per cent.—on the difference for so long a peried, not exceeding three years, as the jury shall be satisfied that she was so continuing her efforts to sell it.

(3.) If you shall find for the plaintiff, then having ascertained a sum you think would on the 24th day of April, 1876, have compensated the plaintiff, you are allowed in your discretion to add interest, not exceeding six per centum, upon that sum from that date, provided you shall think that such sum without interest is not a fair compensation for all the loss you find that the plaintiff has sustained.

(4.) If the jury shall find that plaintiff was damaged by reason of a sale being prevented, they will, in ascertaining the extent of said damage, exclude from consideration as a subject of sale the space devoted to alley purposes.

(5.) If the jury shall find that the defendant so obstructed the access to and egress from the plaintiff's land that she could not use the same as such property is generally used, then the jury are at liberty to allow such damages as they shall find have resulted from the act of the defendant, irrespective of any attempt made by the plaintiff to sell the same.

But the court refused to give each or any of said instructions, and the plaintiff then and there excepted to such refusal and prayed the court to sign and seal her bill of exceptions, which is accordingly done this 29th day of December, A. D. 1894, being a day within the

term at which said trial was had, and which is now signed and sealed on said day as *if* said day of trial.

E. F. BINGHAM. [SEAL.]

Thereupon the court instructed the jury that the testimony showed that the plaintiff offered her property for sale as a whole and undertook to sell it as lot one; that the action was for damages for her not being able to sell lot one; that the testimony showed that even if she had received an offer for lot one she could not consummate the sale because she did not own the fee in the alleys. This being so, and the defendant's counsel conceding that the structure was illegal, the court intructed the jury that plaintiff could not recover anything more than nominal damages, and thereupon instructed the jury to find for the plaintiff for one cent damages, which was done.

16 To which instruction, before the jury retired, and to which finding in accordance with such instruction, the plaintiff then and there excepted, and the said exceptions were allowed, and prayed the court to sign and seal her bill of exceptions, which is accordingly done this 29th day of December, A. D. 1894, being a day within the term at which said trial was had, and which is now signed and sealed on said day as of said day of trial.

E. F. BINGHAM. [SEAL.]

*Stipulation.*

Filed Jan'y 2, 1895.

In the Supreme Court of the District of Columbia.

MARGARET HETZEL
*v.*
THE B. & O. R. R. Co. } At Law. No. 15713.

In making up the transcript of record the clerk will be pleased to note that the suit was begun April 24, 1876, by a declaration consisting of four counts. Three of these counts have been stricken out, leaving the first count only. This count has been amended. This amended count need only be copied into the record. The original first count is identical with the amended count, except that the latter contains the words "and prevented the plaintiff from selling the same, though she tried so to do."

The clerk will also omit the third, fourth, fifth, and seventh pleas to the amended declaration.

FRANK W. HACKETT, *For Pl'ff.*
HAMILTON & COLBERT,
*Attorneys for Defendant.*

In the Supreme Court of the District of Columbia:

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 12, inclusive, *is* a true copy of the record of said court under stipulation filed January 2, 1895, in the cause entitled Margaret Hetzel, plaintiff, and The Baltimore and Ohio Railroad Company, defendant, being number 15713, at law, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Washington, in said District, this 7th day of January, A. D. 1895.

JOHN R. YOUNG, *Clerk*.

17 THE UNITED STATES OF AMERICA, *ss*:

Seal Court of Appeals, District of Columbia.

The President of the United States of America to the justices of the supreme court of the District of Columbia, Greeting:

Whereas in a certain suit in the said supreme court between Margaret Hetzel, to the use of Theodore Bacon, trustee, plaintiff, and The Baltimore and Ohio Railroad Company, defendant, which suit was removed to the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"1. The order of the court overruling the motion of defendant to dismiss the appeal.

"2. The date and amount of the judgments heretofore entered upon verdicts rendered for the plaintiff, with the respective dates of the judgments of the general term setting aside said verdict."

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Court of Appeals, so that you have the same, together with this writ, before the said Court of Appeals forthwith.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, the 25th day of January, A. D. 1895.

ROBERT WILLETT,
*Clerk Court of Appeals of the District of Columbia.*

In the Supreme Court of the District of Columbia.

MARGARET HETZEL, to the Use of THEODORE BACON, Trustee,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY.
} No. 15713. At Law.

SATURDAY, *November* 24, *A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

The defendant's motion to dismiss the plaintiff's appeal in the above-entitled cause for failure to file an appeal bond within the specified time coming on to be heard, it is considered that said motion be, and the same is hereby, overruled, and the plaintiff is granted leave to file said appeal bond.

18 THURSDAY, *June 5th*, *A. D.* 1884.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at the sum of four thousand three hundred and eighty-two dollars and ten cents, with interest thereon from April 24th, 1876, besides costs; therefore it is considered that the plaintiff recover against said defendant said sum of four thousand three hundred and eighty-two dollars and ten cents, with interest as aforesaid, for her damages, in manner and from as aforesaid assessed, and $— for her costs of suit, and have execution thereof.

In General Term.

MONDAY, *January* 12, 1885.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter and Justices MacArthur and James.

* * * * * * *

Now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon, because it appears to the court here, for the reasons assigned by Mr. Justice James, who delivers the opinion of the court, that there was error in the judgment of the special term, therefore it is considered by the court here that the said judgment be, and it is hereby, reversed, with costs, to be taxed by the clerk, and that the case be remanded to the special term to be tried anew, in conformity with the opinion of this court.

FRIDAY, *February* 19, *A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

Now again come here the parties aforesaid, in manner aforesaid, and the same jury return into court and on their oath say they find said issues in favor of the plaintiff and assess her damages by reason of the premises *is* three thousand seven hundred and fifty dollars, besides costs; therefore it is considered that the plaintiff recover against said defendant three thousand seven hundred and fifty dollars, in manner and form as aforesaid assessed, and $— for her costs of suit, and have execution thereof.

19 In General Term.

MONDAY, *July* 11, 1887.

Session resumed pursuant to adjournment.

Present: Chief Justice Bingham and Associate Justices James, Montgomery, and Merrick.

* * * * * * *

This cause having been on the 2nd day of June argued by counsel and submitted to the court, it is now, here, for the reasons assigned by Justice James, considered that the judgment of the special term be, and it is now, here, reversed; and thereupon the cause is remanded to the special term to be tried anew.

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached and returned herewith, that the foregoing are true copies of the original minute entries called for, to wit:

"1. The order of the court overruling the motion of defendant to dismiss the appeal.

"2. The date and amount of the judgments heretofore entered upon verdicts rendered for the plaintiff, with the respective dates of the judgments of the general term setting aside said verdict."

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, the 28th day of January, A. D. 1895.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG,
*Clerk Supreme Court, District of Columbia.*

(Endorsed:) 418. Court of Appeals, District of Columbia. Filed Jan. 31, 1895. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 418. Margaret Hetzel, to the use of Theodore Bacon, trustee, appellant, *vs.* The Baltimore and Ohio Railroad Company. Court of Appeals, District of Columbia. Filed Jan. 8, 1895. Robert Willett, clerk.

20 WEDNESDAY, *November 20th, A. D.* 1895.

* * * * * * *

MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 418.

The argument in the above-entitled cause was commenced by Mr. F. W. Hackett, attorney for the appellant, and was continued by Mr. Geo. E. Hamilton, attorney for the appellee.

THURSDAY, *November 21st, A. D.* 1895.

* * * * * * *

MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 418.

The argument in the above-entitled cause was continued by Mr. Geo. E. Hamilton, attorney for the appellee, and was concluded by Mr. W. D. Davidge, attorney for the appellant.

21 MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 418.

*Opinion of Court.*

Mr. Chief Justice ALVEY delivered the opinion of the court:

It is indeed very questionable whether this appeal is properly before this court for review, because of the failure of the appellant to file an approved appeal bond as required by the rule of this court upon the subject, within the time limited for filing the same. We shall not, however, determine this preliminary question, but shall examine the questions that appear to be presented by the record before us, and if there be no error, bring a long and protracted litigation to an end.

The alleged nuisance that gave rise to the present case, and a case that preceded this, has been the subject of litigation through a series of years, and has been tried and retried a great many times. All the questions that could fairly arise would seem to have been under review by the general term of the supreme court of the District, on several appeals, and, for obvious reasons, we do not propose to review or reverse the court below on any question that has been ruled upon and settled by the general term, in the course of

the litigation. The court below, in the trial of this case, seems to have conformed to the previous rulings of the court in general term, and really leaves but little open for review on this appeal.

It appears that prior to December 28, 1871, in fact for many years prior, the plaintiff and Judge Wylie were owners as tenants in common in fee-simple, of the whole of lot 1 in square 630, according to the ground plan of the city of Washington, except that part of said lot at the northern side or corner thereof, fronting on North Capitol street 35½ feet, by a depth of 120 feet, then owned by Judge Wylie in severalty and exclusively. That all the remainder of the original lot 1 was bounded on North Capitol street and D street northwest.

The plaintiff and Judge Wylie, with a view to partition of all that part of the lot held in common between them, had a subdivision thereof made, the plan of which was duly acknowledged and recorded, according to law, in the office of the surveyor of the District; and they then agreed that in the partition the plaintiff should have allotted to her lots 1, 2, 3, 4 and 5, and that Judge Wylie should have allotted to him lots 6, 7, 8, 9, 10 and 11, according to the plan of subdivision. And, to effectuate this subdivision and partition, the joint deed of the 28th of December, 1871, was made by the parties, and duly acknowledged and recorded. The plat or plan of subdivision is referred to in the deed of partition, and in reference to which the titles to the several lots are conveyed in severalty. In the subdivision of the original lot 1, there were several alleys laid out on the plat or plan recorded, and the parties, by the deed, mutually covenanted with each other, that all such alleys, and the area delineated on the plat, should be private, and be under the control of all owners of property touching thereon, "and shall never be closed unless by common consent, and the owners thereof and of each of said lots shall at all times contribute their and each of their joint and equitable proportions of all proper and necessary charges for paving the said alleys and area, and keeping the same in proper condition, by means of drains, sewers or otherwise, and the same are to be for the exclusive use of said owners." By sec. 480, Rev. Stats. D. C., it is provided that: "The ways, alleys or passages, laid out or expressed on any plat of subdivision, shall be and remain to the public, or subject to the uses declared by the person making such subdivision, at all times under the same police regulations as the alleys laid off by the Commissioners on division with the original proprietors."

In 1872, before the bringing of this suit, the plaintiff purchased the lots that had been allotted to Judge Wylie in the partition, and also the lot on the northern corner which had been held by Judge Wylie in severalty before the partition. Lots 1 and 2 of the subdivision front on D street, and the southern side of lot 3 binds its entire length on D street, and fronts, with all the other lots, on North Capitol street. All the lots were vacant and wholly unimproved.

The obstruction of D street complained of is admitted to have
22 been without legal authority, and the obstruction was of D

street northwest, opposite the front of lots 1 and 2, and along the south side of lot 3, of the subdivision; but as to the other lots in the subdivision, the freight cars causing the obstruction complained of in D street offered no obstruction whatever to their access. The lots fronting on North Capitol street, except lot 3 siding on D street, all being open and vacant, it is difficult to perceive in what way the obstruction on D street could affect them. Lots 1, 2 and 3 may have been affected; but a party who owns and has a particular parcel of land affected by the existence of a contiguous nuisance cannot purchase other parcels of land not so affected in contemplation of law, and by adding the parcels together increase the amount of damages recoverable; at least, not under the conditions existing in this case. The subdivision of the original lot made separate and distinct parcels or lots, and those allotted to Judge Wylie did not abut on D street, and the access to and exit from them were not affected by the obstruction on that street. The plaintiff, in respect to those lots, is not entitled to stand in a more favorable position than Judge Wylie could occupy if he had not sold the lots, and it is clear, if Judge Wylie were still owner of the separate lots assigned to him in the partition, all fronting on North Capitol street, he would have no cause of action in respect of such lots for the obstruction in D street, such as that sued for in this case.

What is the real cause of action as set forth in the declaration? The suit was brought by the plaintiff on the 24th of April, 1876, and she alleges that she was before and ever since the 24th of April, 1873, seized in fee-simple of a certain lot of ground, situated and being on the corner of D and North Capitol streets, in the city of Washington, being lot number one, in square 630, in said city, and that there has been a public street and highway for all persons, &c., and which was used by the plaintiff and others as of right for access to and egress from said lot; yet the defendant, well knowing the premises, but contriving and wrongfully intending to injure the plaintiff, and to incommode and annoy her, together with the public, in the use and enjoyment of said D street, and more particularly to prevent the plaintiff and others from enjoying that portion of said D street upon which plaintiff's lot abuts, from obtaining access to and exit from said lot of ground, and with intent wrongfully to diminish the value of said lot of ground, &c., on the 24th of April, 1873, and at divers other times since, obstructed said D street by placing thereon freight cars, in large numbers, &c., and suffered them to remain there an unreasonable time, &c., and thereby prevented the plaintiff, as well as the public, from passing and repassing on said D street, and more particularly from using that portion of D street on which plaintiff's lot abuts, to gain access to or exit from said lot of ground, and still obstructs said street, &c., and thereby materially and seriously diminished the value of said land, and prevented the plaintiff from selling the same, though she tried so to do; to the special damage of the plaintiff.

The defendant pleaded the general issue plea of not guilty, and also the statute of limitations, former recovery, and other defenses not material to mention.

The evidence in the record before us is exceedingly meagre. There is not a particle of evidence as to the saleable value of the land, without reference to the existence of the nuisance complained of, or to what extent the existence of the nuisance would affect that value. Nor is there any evidence of the rental value of the property, without the presence of the nuisance, and to what extent the existence of the nuisance would affect such rental value. These facts were essential to be ascertained, in order to furnish a basis for estimating the damages. In an action like the present, the plaintiff must show actual damages sustained, and not damages resting in conjecture or contemplation merely; and the recovery, in the first instance, is limited to the actual damages sustained by reason of the nuisance, and its effect upon the rights and property of the plaintiff.

The plaintiff, at the trial, offered a series of prayers for instruction to the jury. They were all refused by the court, and properly refused. They were all founded upon the assumption of injury to the plaintiff in respect of all the lots contained in the subdivision of the original lot 1; and, moreover, they did not propound any such proper and exact rule for estimating damages, as the court, in this class of wrongs, would have been justified in giving to the jury. But, apart from all this, the evidence upon which the prayers were founded showed a state of case quite different from that set out in the declaration. It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover, and the one must consist with the other. The declaration here, as we have seen, proceeds as for an injury to the entire original lot, without any reference or respect to the subdivision of that lot, and that the lots made of the subdivision are separate and distinct parcels of ground, fully recognized and provided for by law; and entirely ignores the fact that the plaintiff never was in reality seized in severalty of the original lot 1, as it existed before the subdivision, and as declared upon in the declaration.

The proof produced by the defendant, showing how lot 1 was originally held, and how it had been subdivided and partitioned, and how title to all the lots were acquired by the plaintiff, and their relation to each other and the streets upon which they abut, entirely negatives and refutes the case presented in the declaration, and the right of the plaintiff to recover thereon.

The court below, upon the refusal of the prayers offered by the plaintiff, instructed the jury, "that the testimony showed that the plaintiff offered her property for sale as a whole, and undertook to sell it as lot one; that the action was for damages for her not being able to sell lot one; that the testimony showed that even if she had received an offer for lot one she could not have consummated the sale, because she did not own the fee in the alleys. This being so, and the defendant's counsel conceding that the obstruction was illegal, the court instructed the jury that the plaintiff could not recover anything more than nominal damages, and thereupon instructed the jury to find for the plaintiff one cent damages, which

was accordingly done." Perhaps the more correct instruction, under the facts of the case, would have been to render a verdict for the defendant; but the judgment being substantially correct, it will be affirmed.

Judgment affirmed.

23 TUESDAY, *January 7th, A. D.* 1896.

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MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 418. January Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

January 7, 1896.

(Mr. Justice Morris did not sit in this case.)

24–26 MONDAY, *January 13th, A. D.* 1896.

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MARGARET HETZEL, to the Use of THEODORE BACON, Trustee, Appellant,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 418.

On motion of Mr. F. W. Hackett, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

(MEMORANDUM.—Bond on writ of error omitted in printing, per stipulation of counsel. See side page 30.)

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Margaret Hetzel, to the use of Theodore Bacon, trustee, appellant, and The Baltimore and Ohio Railroad Company, appellee, a manifest error hath happened, to the great damage of the said appellant, as by her complaint appears, we, being willing that error, if any hath been, should be duly cor-

rected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
*Clerk of the Court of Appeals of the District of Columbia.*

28 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Margaret Hetzel, to the use of Theodore Bacon, trustee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 17th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
*Chief Justice of the Court of Appeals of the District of Columbia.*

Service accepted.
G. E. HAMILTON,
*For B. & O. R. R. Co.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 17, 1896. Robert Willett, clerk.

29 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 28, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals

in the case of Margaret Hetzel, to the use of Theodore Bacon, trustee, appellant, *vs.* The Baltimore and Ohio Railroad Company, No. 418, January term, 1896, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 25th day of January, A. D. 1896.

ROBERT WILLETT,
*Clerk of the Court of Appeals of the District of Columbia.*

30 In the Supreme Court of the United States.

MARGARET HETZEL, to the Use of THEODORE BACON, Plaintiff in Error,
*vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY.
No. 110. October Term, 1897.

It is hereby stipulated that the following portion of the record may be omitted in printing, and the clerk will please note such omission at the appropriate place by a line to that effect:

Pages 25 and 26, text of bond given on writ of error to the Supreme Court of the United States in the sum of $300.00.

FRANK W. HACKETT,
*For Plaintiff in Error.*
G. E. HAMILTON,
M. J. COLBERT,
*For Def't in Error.*

31 [Endorsed:] Case No. 16,161. Supreme Court U. S., October term, 1897. Term No., 110. Margaret Hetzel, to use of Theo. Bacon, pl'ff in error, *vs.* The Baltimore and Ohio Railroad Company. Stipulation to omit part of record in printing. Office Supreme Court U. S. Filed Oct. 2, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,161. District of Columbia Court of Appeals. Term No., 110. Margaret Hetzel, to the use of Theodore Bacon, trustee, plaintiff in error, *vs.* The Baltimore & Ohio Railroad Company. Filed January 27, 1896.